

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

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GAO 97-46

FILE: B-191949

DATE: January 18, 1979

MATTER OF: KET, Incorporated

CNG2368

**DIGEST:**

[Dismissal of Protest Alleging Wrongful Agency Action]

Although an earlier protest was decided at court's request, new protest alleging subsequent wrongful agency action is dismissed. Issues raised are similar to those now pending before court and court has not indicated interest in further consideration and decision by GAO.

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CNG395

KET, Incorporated protests the exercise of options to purchase Control Data Corporation CDC 3500 memory under Internal Revenue Service contract GS-00S-84580 as amended.

AGC 4

DLG 6663

The exercise of these options was the subject of a prior decision in KET, Incorporated, B-191949, October 27, 1978, 58 Comp. Gen. \_\_\_, 78-2 CPD 305. There we responded to the request of the District Court and Court of Appeals for the District of Columbia, concluding that the procedures followed by the IRS in excluding KET equipment from consideration were unduly restrictive of competition. We expressed the view that the IRS should take appropriate steps to permit a competitive procurement action to be conducted, but that in any event KET should be permitted to demonstrate the acceptability of its equipment before any options were exercised.

AGC 748

KET now complains that the IRS complied with our opinion only in appearance. According to KET the IRS contacted it the morning the decision was released and insisted that a demonstration be conducted immediately. While KET was reluctant to hold the test on such short notice, it did so over objection upon assurances by the IRS that certain conditions would be met. In particular, KET states that the IRS agreed to furnish certain cabling

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which would directly affect timing. According to KET the IRS breached its agreement by not furnishing the equipment promised. Nevertheless KET insists the test demonstrated that its equipment would perform as required, taking into account the circumstances under which the test was conducted. This notwithstanding, the IRS reported to the General Services Administration (GSA) that KET had failed the test, in KET's view improperly and wrongfully inducing GSA to issue a delegation of procurement authority for the IRS to exercise the subject options. AGC 17

In addition to filing a new protest in our Office, KET amended its complaint in the district court to reflect these events. This matter is presently pending before the district court.

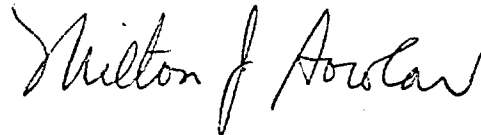
As the parties are aware, it is our policy to dismiss a protest where a protester files a request for relief in a court of competent jurisdiction involving the same or similar issues, unless the court expresses an interest in receiving our decision. See, e.g., Donley, Richardson and Associates, B-190772, January 10, 1978, 78-1 CPD 20. The IRS believes that this policy should be applied in this case. KET states that it should not, arguing that the court has not had an opportunity to make such a request and that the Government has played the court and GAO off against each other.

Regarding the contention that the court has not had an opportunity to request our opinion, KET argues that the request in the earlier case was made in open court and that this matter has not come on for hearing since KET amended its complaint. Because the court did make a request in that case, KET reasons, it would do so again.

In our view it would be inappropriate for this Office to speculate as to what the court might or might not do in any particular set of circumstances. Moreover, we are aware of nothing to prevent KET from filing a motion asking the court to make such a request by written order prior to further formal proceedings. Cf., e.g., The George Sollitt Construction Co., B-190743, September 25, 1978, 78-2 CPD 224.

In connection with KET's contention that the Government is attempting to play the court and GAO against each other, KET notes that the IRS has filed a motion with the court requesting that the litigation be dismissed as moot. While again we believe it would be improper to speculate regarding the disposition of that motion, it appears that KET has defended its interest in the litigation, asserting that its complaint is not academic and that dismissal at this point would be improper.

Accordingly, we are closing our file in this matter without further action but also without prejudice should the court later request our decision.

A handwritten signature in cursive script, reading "Milton J. Socolar".

Milton J. Socolar  
General Counsel